

FEDERAL ELECTION COMMISSION
999 E STREET, N.W.
WASHINGTON, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

MUR: 6415

DATE COMPLAINT FILED: 10/29/2010

DATE OF NOTIFICATION: 11/4/2010

LAST RESPONSE RECEIVED: 11/23/2010

DATE ACTIVATED: 6/1/2011

EXPIRATION OF SOL: 9/30/2015 (earliest),
10/21/2015 (latest)

COMPLAINANT:

Betty Breck

RESPONDENTS:

Kristi for Congress and Ted Hustead,
in his official capacity as treasurer
Kristi Lynn Noem

RELEVANT STATUTES
AND REGULATIONS:

2 U.S.C. § 441d
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter concerns allegations that Kristi Lynn Noem and her principal campaign committee, Kristi for Congress and Ted Hustead, in his official capacity as treasurer ("the Committee"), failed to include a disclaimer on one of two visually distinct messages (one positive and one negative) that appear next to one another on the same page of a newspaper advertisement. See Attachment 1. The Committee states that it paid for the full-page newspaper ad space as a single advertisement, and that the clear and conspicuous disclaimer on one of the two messages applies to the whole page.

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1 While there is a clear and conspicuous disclaimer as to one of the two messages, the
2 design of the ad makes it unclear as to whether it is one ad or two ads. Accordingly, readers may
3 be confused as to who paid for the second message. Because the ad space appears to consist of
4 two separate messages, the placement of the disclaimer in the message at the top of the ad space
5 is not "clear and conspicuous" and could be easily overlooked with regard to the message at the
6 bottom of the ad space and thus violates the Federal Election Campaign Act of 1971, as amended
7 ("the Act"), and Commission regulations. See 2 U.S.C. § 441d and 11 C.F.R. § 110.11.

8 **II. FACTUAL AND LEGAL ANALYSIS**

9 **A. Facts**

10 The Complaint states that on September 30, 2010 and October 21, 2010, Respondents
11 placed "what appeared to be two political ads on one page . . . in the major South Dakota
12 newspapers." Complaint at 1.

13 The message at the top of the page, which consumes two-thirds of the ad space, is placed
14 on a white background with black text. See *id.* Exh. A. It contains a picture of Ms. Noem on her
15 ranch and is entitled, "South Dakota has one voice in Congress. It needs to be speaking for you."
16 *Id.* In this message, Ms. Noem promises to vote to "[l]ower the national debt," "[v]ote against
17 wasteful spending," "[r]epeal government mandated health care," "[w]ork every day to create
18 jobs," and not vote "to make Nancy Pelosi Speaker." *Id.* The Committee's campaign logo, web
19 address, and a disclaimer that states, "Paid for by Kristi for Congress," enclosed within a
20 separate box, appear at the bottom of this message. See *id.*

21 The message on the bottom third of the ad space is separated from the first message by a
22 solid black border and consists of a black background with white text. See *id.* It contains a
23 picture of President Obama and is entitled, "Washington is Broken," citing "[f]ewer jobs,"

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1 "[g]overnment-run health care," "[w]asteful spending," and "[p]utting special interests ahead of
2 small businesses." *Id.* The message concludes, "The truth is we don't have a voice in Congress
3 right now, just a rubber stamp for the Obama-Pelosi big government agenda[.]" *Id.* Unlike the
4 larger message at the top of the ad space, this message does not include a separate disclaimer or
5 any other identifying information such as a campaign logo or web address. *See id.*

6 The Complaint asserts that the ad space consists of "two distinct and separate boxes,
7 totally separate physically, and completely unconnected on the page," as evidenced by borders
8 that enclose both messages, distinct content, and opposing color schemes for the backgrounds
9 and texts. *Id.* at 1. While the Complaint acknowledges that the message at the top of the ad
10 space includes a proper disclaimer, it also asserts that "[t]he disclaimer is at the bottom center of
11 this ad, indicating the end of that ad. The arrangement on the page clearly indicates that only the
12 top box ad was paid for by Noem." *Id.*

13 The Complaint and Response indicate that the Committee purchased the ad space from
14 the South Dakota Newspaper Association ("SDNA"), and provided both messages as "one full-
15 page, camera-ready ad."¹ *Id.* at 2. *See also* Response at 1. The Response asserts that because
16 the Committee paid for the ad space as one block, the disclaimer applies to both messages and
17 the "[a]dvertisement completely and fully complies with an federal law and FEC regulations
18 with respect to printed disclaimers." Response at 2.

¹ A review of the Committee's disclosure reports, however, does not reflect any payments to SDNA, or for newspaper advertising costs. The costs may be related to other disbursements for "media production," or may be part of unitemized consultant fees. Accordingly, the Committee's expenditures for the ad campaign remain unknown.

B. Analysis

All public communications made by a political committee must include disclaimers.²

2 U.S.C. § 441d(a)(1); 11 C.F.R. § 110.11(a)(1). In this matter, the ad constitutes a “public communication” because it is a communication “by means of . . . newspaper,” and requires a disclaimer because Ms. Noem’s principal campaign committee produced and distributed it.³ See 2 U.S.C. § 441d(a)(1); 11 C.F.R. § 110.11(a)(1).

For printed communications, the Act and Commission regulations specify that the disclaimer be of sufficient type size to be clearly readable, be contained in a printed box set apart from the other contents of the communications, and be printed with a reasonable degree of color contrast between the background and printed statement. 2 U.S.C. § 441d(c)(1)-(3); 11 C.F.R. § 110.11(c)(2)(i)-(iii). The Commission’s regulations also specify that a disclaimer notice must be “presented in a clear and conspicuous manner.” 11 C.F.R. § 110.11(c)(1). A disclaimer is not “clear and conspicuous” if the print is “difficult to read” or if the placement is “easily overlooked.” 11 C.F.R. § 110.11(c)(1).

Here, however, the placement of the disclaimer in the message at the top of the ad space is not “clear and conspicuous” as to who paid for and authorized the message at the bottom of the ad space. Because the ad space appears to contain two separate messages, a viewer would have difficulty concluding that the Committee paid for and authorized both messages because

² A “public communication,” includes any communication “by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” 11 C.F.R. § 100.26.

³ See FEC Form 1, Amended Statement of Organization (Apr. 5, 2011), <http://query.nictusa.com/pdf/034/11930588034/11930588034.pdf#navpanes=0> (designating Kristi for Congress as Ms. Noem’s principal campaign committee).

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1) they appear in separate, self-contained spaces with opposing graphic designs separated by borders that frame their content; 2) convey one message about Ms. Noem and another contrasting message about President Obama and Speaker Pelosi; and 3) fail to include identifying information in the message at the bottom of the ad space that associates it with the Committee.

Respondents maintain that the ad submitted on one page and apparently printed and distributed as such, ~~does not require more than one disclaimer because it gives the public an~~ indination, at least, as to who ~~may have sponsored the message at the bottom of the ad space, so~~ that the identity of that sponsor is not completely unknown. Both messages also share a common theme – criticism of the political culture in Washington, D.C. and the federal government – which could indicate to the public that the same group may have sponsored both messages.⁴ Nevertheless, it is not immediately apparent that the messages are part of a single advertisement because the absence of a disclaimer in the message at the bottom of the ad space opens questions as to whether it comes from the same source as the message at the top of the ad space.

Finally, while the message at the top of the ad space would, standing alone, lead the viewer to conclude that Ms. Noem and her Committee are responsible for the message, no similar identifying information can lead to the same conclusion for the message at the bottom of the ad space because it makes no reference to Ms. Noem or her Committee. See MUR 6278 (Joyce B. Segers) General Counsel's Report at 2 (dismissing allegations that respondent failed to include proper disclaimers for its website and flyers because "the public could reasonably

⁴ Indeed, the Committee appears to have modified the ad in an online version that eliminates the borders previously separating the messages and applies a black printed border that encloses both messages within the same space. Further, a banner that states, "Vote Tuesday Nov. 2," at the bottom-right hand side of the first advertisement touches the top of the second advertisement, thus arguably linking the two. These efforts may demonstrate the Committee's acknowledgement that there is some ambiguity as to whether the disclaimer also applies to the message at the bottom of the ad space. See Attachment 2, http://tearsheets.broadcasteronline.com/october10/102910/pli_102910_xtra_004.pdf (Oct.29, 2010).

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discern that the [respondent] produced the information" based on identifying information like the committee's name, address, phone number, website, and email address).

Accordingly, for the reasons discussed above, the disclaimer in the message at the top of the ad space is "easily overlooked" as applied to the message at the bottom of the ad space. Thus, the disclaimer is not "clear and conspicuous" and appears to violate 2 U.S.C. § 441d and 11 C.F.R § 110.11.

The Commission's recent practice in matters that involve disclaimer issues has been to dismiss the complaint with a reminder that respondents comply with the disclaimer requirements. See, e.g., MUR 6316 (Pridemore for Congress) and MUR 6329 (Michael Grimm for Congress) (dismissing the complaints through the Enforcement Priority System ("EPS") for technical violations of the disclaimer requirements where respondents also took prompt remedial action). Alternatively, the Commission has also dismissed violations of the disclaimer requirements but cautioned respondents. The issue previously arose in MUR 5990 (Matt Shaner), an EPS matter that included allegations that respondents violated the disclaimer provisions of the Act and Commission regulations.

see also MUR 5990 Certification

(dated March 12, 2009) (voting 6-0 to approve the Office's recommendation to dismiss the matter, send respondents a cautionary notification, and close the file).

Subsequently, the Commission has dismissed the complaint, but issued a cautionary notification to the respondent regarding the disclaimer requirements. *See* MUR 6132 (Queen Anne's County Democratic Central Committee) General Counsel's Report at 2-3; MUR 6163 (Houghton County Democratic Committee) Factual and Legal Analysis at 7-8, 10; MUR 6170 (Tuscola County Democratic Committee) Factual and Legal Analysis at 6, 7-8.

Due to the circumstances of this matter, including the fact that there is a disclaimer, even if it could be viewed as applying to only part of the ad, pursuit of this matter would not merit the further use of Commission resources. *See* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12545-6 (Mar. 16, 2007). Accordingly, we recommend that the Commission exercise its prosecutorial discretion and dismiss the Complaint as to allegations that Respondent Kristi for Congress violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11, include a cautionary notification to the Committee regarding the disclaimer requirements of the Act in the closing letter, and close the file. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

We further recommend that the Commission find no reason to believe that Respondent Kristi Lynn Noem violated 2 U.S.C. § 441d or 11 C.F.R. § 110.11 because the Committee, which produced and distributed the ad, was responsible for the placement of the disclaimer on its public communication.

III. RECOMMENDATIONS

1. Dismiss the allegation that Respondent Kristi for Congress and Ted Hustead, in his official capacity as treasurer, violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11;
2. Find no reason to believe that Respondent Kristi Lynn Noem violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11;
3. Approve the attached Factual and Legal Analysis;

1 4. Approve the appropriate letters;

2
3 5. Close the file.
4

5 Christopher Hughey
6 Acting General Counsel
7

8 Kathleen Guith
9 Acting Associate General Counsel
10 for Enforcement
11

12 8/30/2011
13

14
15 Date

16 BY:

17 Mark D. Shonkwiler
18 Assistant General Counsel
19

20
21 Phillip A. Olaya
22 Attorney
23

24 Attachments 1. Newspaper ad
25 2. Ad (as modified online)
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Here on the ranch in South Dakota, we don't take a lot of polls. Or hold many caucuses. We do what needs to be done. That's what I'll do in Washington. Unlike my opponent, I'll vote to:

- Lower the national debt
- Vote against wasteful spending
- Repeal government mandated health care
- Work every day to create jobs

I believe government should serve the people - not the other way around. And I know how to balance a budget: I have worked as a farmer-rancher for 17 years and serve as a state representative, fighting to keep our state budget in shape.

My first vote won't be to make Nancy Pelosi Speaker,

Kristi Noem



www.KristiForCongress.com

PAID FOR BY KRISTI FOR CONGRESS

WASHINGTON IS BROKEN

Washington is attacking our freedom, refusing to balance the budget, piling up debt, and our children will pay the way.

- ✓ Fewer jobs
- ✗ Government health care
- ✗ Wasteful spending
- ✗ Putting special interests ahead of small businesses

The truth is we don't have a voice in Congress right now, just a rubber stamp for the Obama-Pelosi government agenda.

South Dakota has one voice in Congress.

It needs to be speaking for you.



Here on the ranch in South Dakota, we don't take a lot of polls. Or hold many caucuses. We do what needs to be done. That's what I'll do in Washington. Unlike my opponent, I'll vote to:

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My first vote won't be to make Nancy Pelosi Speaker.

Kristi Noem



www.KristiForCongress.com

PAID FOR BY KRISTI FOR CONGRESS

WASHINGTON IS BROKEN

Washington is attacking our freedom, refusing to balance the budget and running up debt our children will have to pay off.

- X Fewer jobs
- X Government-run health care
- X Tax and spend
- X Big government
- X Big spending
- X Big debt

The truth is we don't have a voice in Congress. Let's elect a party that will put the people first. Pelosi big government is not the answer.